U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-, INC.

DATE: OCT. 15, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner describes itself as a software development and consulting business. It seeks to permanently employ the Beneficiary in the United States as a software engineer. The Petitioner requests classification of the Beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

At issue in this case is whether the Beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is August 7, 2013.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in computer science, engineering, technology, or related.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: "Any suitable combination of

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

> education, training or experience is acceptable. Travel to various client sites throughout the U.S."

Part J of the labor certification states that the Beneficiary possesses a master's degree in computer science from [redacted] completed in 2010. The record contains a copy of the Beneficiary's diploma from the [redacted] issued in 2010, and transcripts, issued March 30, 2011. The record also contains a copy of the Beneficiary's Bachelor of Technology (Electrical & Electronics Engineering) diploma issued by [redacted] India, on March 29, 2008.

The Director issued a notice of intent to deny (NOID) to the Petitioner to notify the Petitioner that the Beneficiary's master's degree from the [redacted] was unaccredited and, therefore, the Beneficiary did not have a U.S. master's degree or foreign equivalent to meet the terms of the labor certification. As the Petitioner did not send evidence to overcome this issue in response to the NOID, the Director denied the petition on this basis.

The Petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.[3] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] We may deny a petition that does not comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.[5]

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

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[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). Our *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[6] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C.

[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the Beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the Beneficiary qualifies for the offered position, and whether the offered position and the Beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the Beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

The Beneficiary possesses a master's degree from the [redacted] which is not accredited by a recognized accrediting agency. The Director set forth the school's continuing accreditation and investigation issues in his decision beginning in January 2007. For the reasons set forth below, a degree from an unaccredited institution will not be considered an advanced degree under 8 C.F.R. § 204.5(k)(2). As noted above, however, the terms of the labor certification do not allow for any alternate combination of education and experience at Line H.8. or anything less than a master's degree.

In the United States, institutions of higher education are not authorized or accredited by the federal government.[7] Instead, the authority to issue degrees is granted at the state level. However, state approval to operate is not the same as accreditation by a recognized accrediting agency.

According to the U.S. Department of Education (DOE), "[t]he goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality."[8] Accreditation also ensures the nationwide recognition of a school's degrees by employers and other institutions, and also provides institutions and its students with access to federal funding.

Accrediting agencies are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions meet those criteria.[9] Institutions that meet an accrediting agency's criteria are then "accredited" by that agency.[10]

The DOE and the Council for Higher Education Accreditation (CHEA) are the two entities responsible for the recognition of accrediting bodies in the United States. While the DOE does not accredit institutions, it is required by law to publish a list of recognized accrediting agencies that are deemed reliable authorities as to the quality of education provided by the institutions they accredit.[11]

The CHEA, an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. The presidents of American universities and colleges established CHEA in 1996 "to strengthen higher education through strengthened accreditation of higher education institutions."[12] CHEA also recognizes accrediting organizations. "Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established."[13] According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort."[14]

Accreditation may be regional, national, or specialized.[15] CHEA recognizes the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) as the accrediting association with jurisdiction over Virginia for regional accreditation, where the [redacted] is

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[7] *See* http://ope.ed.gov/accreditation.
[8] http://www2.ed.gov/print/admins/finaid/accred/accreditation.html.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.
[13] *Id.*
[14] *Id.*
[15] *See* http://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html; *see also* http:www.sacscoc.org/FAQsanwers.asp.

located.[16] SACSCOC's website lists all accredited institutions within its jurisdiction, and the [redacted] is not named as one of the accredited institutions.[17]

According to the website maintained by the DOE[18] the Accrediting Council for Independent Colleges and Schools (ACICS) granted accreditation to the [redacted] on January 1, 2003. However, according to the DOE website, ACICS terminated the university's accreditation on August 6, 2008. ACICS is responsible for national accreditation to include, "the accreditation of private postsecondary institutions offering certificates or diplomas, and postsecondary institutions offering associate, bachelor's, or master's degrees in programs designed to educate students for professional, technical, or occupational careers, including those that offer those programs visa distance education."[19] As noted by the Director, the State Counsel of Higher Education for Virginia (SCHEV), first audited the school in January 2007 and ACICS initially denied reaccreditation in August 2007,[20] and the school's accreditation was formally revoked in August 2008. Therefore, the [redacted] is not accredited by a recognized accrediting agency. The Beneficiary began his studies in the Fall of 2008, completed his program of study in the summer of 2009, and his degree was issued on June 26, 2010. Before the Beneficiary began his studies at the [redacted], its accreditation was under review, and had been formally revoked by the time he completed his studies, and at the time of his degree issuance, it was not an accredited institution. The Beneficiary, therefore, does not have an accredited master's degree.

In summary, accreditation provides assurance of a basic level of quality of the education provided by an institution as well as the nationwide acceptance of its degrees. An unaccredited degree does not provide a sufficient assurance of quality. Therefore, since the Beneficiary's master's degree from the [redacted] is not from an accredited institution of higher education, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2), and the Beneficiary does not have the education to meet the terms of the labor certification. As noted above, at Line H.4 of the labor certification the Petitioner allowed only for a master's degree and did not allow candidates to qualify through any alternate education or experience at Line H.8.

We cannot accept the Petitioner's claim that the Beneficiary's degree from the [redacted] should be accepted as an advanced degree because U.S. Immigration and Customs Enforcement had approved the school to enroll foreign students under the Student and Exchange Visitor Program. The approval of an institution to enroll nonimmigrant foreign students pursuant to 8 C.F.R. § 214.3 is unrelated to the requirements for immigrant classification as an advanced degree professional. A broad range of educational institutions may be approved to enroll foreign students, including community colleges, junior colleges, seminaries, conservatories, high schools, elementary schools, and institutions which provide language training, instruction in the liberal arts or fine arts,

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[16] *See* http://www.chea.org/Directories/regional.asp.
[17] http://www.sacscoc.org/pdf/webmemlist.pdf.
[18] http://ope.ed.gov/accreditation/Search.aspx.
[19] *See* http://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html.
[20] http://www.acics.org/uploadedFiles/Actions/AUG07fortheWEB.pdf.

and/or instruction in the professions. *Id.* The fact that an institution is authorized to enroll nonimmigrant students does not mean that its degrees or programs of study meet the requirements of an advanced degree under 8 C.F.R. § 204.5(k)(2).[21] Additionally, the SCHEV website contains an advisory that "[o]n July 28, 2011, the Department of Homeland Security (DHS) issued the [redacted] a 'Notice of Intent to Withdraw' its certification as an approved Student and Exchange Visitor Program (SEVP) institution. . . . On July 16, 2013, SCHEV revoked the [redacted] Certificate to Operate pursuant to 8 VAC 40-31-180(B)(2)(c)."[22]

The Petitioner, on appeal, challenges the Director's determination that a degree from an unaccredited institution does not satisfy the labor certification's requirement of a master's degree. The Petitioner affirms that USCIS must follow the plain meaning of the language on the labor certification. However, the Petitioner did not provide any support for the assertion that the plain meaning of "master's degree" would be satisfied by a degree from an unaccredited institution. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Finally, the Petitioner asserts on appeal that the Beneficiary "received 18 credit hours over the Spring and Summer of 2008" before the [redacted] lost its accreditation. The Petitioner asserts that USCIS should not "retroactively deprive the Beneficiary of an immigration benefit." However, the fact that the university may not have had its accreditation officially revoked when the Beneficiary enrolled and took his first classes is not sufficient to establish that he received a master's degree from an accredited U.S. institution. As noted above, the school lost its accreditation before the beneficiary completed his coursework, and before his degree was issued. At the time the beneficiary had enrolled, ACICS has already affirmed its denial of reaccreditation.

After reviewing all of the evidence in the record, it is concluded that the Petitioner has not established that the Beneficiary possessed at least a U.S. advanced degree (or a foreign equivalent degree) to meet the terms of the labor certification. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act, and the petition may not be approved.[23]

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[21] It appears that the school was audited by the State Council for Higher Education in Virginia (SCHEV) periodically from 2007 onward, as noted in the Director's decision. *See* [redacted]

[22] [redacted] *See also* [redacted]

[23] We additionally note that at line H.8 of the labor certification the Petitioner did not allow for any equivalent of a bachelor plus five years of progressive experience. Further, even if the Petitioner had stated any equivalency on the labor certification, nothing in the file demonstrates that the Beneficiary has five years of progressive experience following completion of his bachelor's degree before the time of the priority date.

Ability to Pay the Proffered Wage

Beyond the decision of the Director, in any further filings the Petitioner should submit additional evidence to establish its continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The record contains the Petitioner's 2013 tax return, the Beneficiary's 2013 IRS Form W-2, and pay statements issued to the Beneficiary in 2014.

According to USCIS records, since the August 7, 2013, priority date of the current petition, the Petitioner has filed Form I-140 petitions on behalf of 67 other beneficiaries. Additionally, the Petitioner has sponsored numerous other workers who may not have adjusted yet to permanent residence. Accordingly, the Petitioner would need to establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary who was sponsored, but not yet adjusted to permanent resident status, from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).[24]

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Without further information on the multiple filings, we cannot determine that the Petitioner can establish its continuing ability to pay the proffered wage to the Beneficiary and the proffered wages to the beneficiaries of its other petitions. The record only contains the Petitioner's 2013 tax return as the Petitioner's 2014 tax return was unavailable at the time of the filing. The Petitioner should submit this in any further filings. While the Petitioner's 2013 tax return reflects fairly high gross receipts and wages paid, as noted, the record contains only one year of tax returns so that we are unable to determine whether this reflects consistent levels for the petitioner, and if the petitioner can pay all of its sponsored workers as a result. The Petitioner should address this issue in any further filings.

Bona Fide Job Offer

Also beyond the decision of the Director, in any further filings the Petitioner should submit additional evidence to establish that it will be the Beneficiary's actual employer. Because the filing of an labor certification application establishes a priority date for any immigrant petition later based on the labor certification, the Petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the Beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). *See also* 8 C.F.R. § 204.5(g)(2). The Petitioner indicated on Part 5, Line 2.c, of the Form I-140 petition that it employed 273 workers. However, public records reveal that the Petitioner's principal office consists of just 3,082 square feet.[25] The Petitioner states on its tax return

[24] The Petitioner has also filed applications on behalf of 353 H-1B workers since the priority date. The Petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

[25] The website maintained by the Secretary of the Commonwealth of Massachusetts reveals the Petitioner's principal

that it is a "placement service" company. While the labor certification does indicate that the job would involve "travel to various client sites throughout the U.S.," it is unclear that there would be adequate work space for the Beneficiary and the Petitioner's workforce to be employed at the Petitioner's primary worksite. Therefore, the Petitioner appears to employ its workforce mainly offsite by contract, and it is not clear who the Beneficiary's actual employer will be. The Department of Labor (DOL) regulation at 20 C.F.R. § 656.3[26] states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The Petitioner should address this issue in any further filings.

III. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the Beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The Director's decision denying the petition is affirmed. The record lacks evidence to fully demonstrate that the Petitioner can establish the ability to pay the proffered wage as of the priority date based on its multiple sponsored workers. Additionally, the Petitioner must address the issue of who the Beneficiary's actual employer will be in any further filings. These issues must be addressed in any further filings.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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office as , MA. Commercial real estate records reveal that this location consists of four private offices, two conference rooms, a library, a reception area, a kitchen, and restrooms totaling 3,082 square feet.

[26] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

ORDER: The appeal is dismissed.

Cite as *Matter of A-C-, INC.*, ID# 14112 (AAO Oct. 15, 2015)